No. 85-1301 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

—v.—

THE JUDICIAL CONFERENCE OF THE UNITED STATES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS HON. JOHN C. GODBOLD, CHIEF JUSTICE OF THE ELEVENTH CIRCUIT; HON. GERALD B. TJOFLAT, CIRCUIT JUDGE; HON. FRANK M. JOHNSON, JR., CIRCUIT JUDGE; HON. SAM C. POINTER, JR., CHIEF JUDGE, NORTHERN DISTRICT OF ALABAMA, AND HON. WILLIAM C. O'KELLEY, DISTRICT JUDGE, NORTHERN DISTRICT OF GEORGIA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in applying the ripeness doctrine to defer ruling on the constitutionality of the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980 (the "Act") in view of the fact that at the time of its decision, all that the Investigating Committee had done was to conduct a fact gathering investigation.

2. Whether the Court should reach the merits of the constitutionality of the Investigating Committee's statutory power to investigate, hold proceedings and issue subpoenas in view of the fact that the Court of Appeals for the Eleventh Circuit has considered this question, has issued an opinion and the appellant has sought a writ of certiorari in that case.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Hon. John C. Godbold, Chief Justice of the Eleventh Circuit; Hon. Gerald B. Tjoflat, Circuit Judge; Hon. Frank M. Johnson, Jr., Circuit Judge; Hon. Sam C. Pointer, Jr., Chief Judge for the Northern District of Alabama; and Hon. William C. O'Kelley, District Judge for the Northern District of Georgia, members of the Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Investigating Committee") respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the District of Columbia in this case. That opinion is reported in *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093.

STATEMENT OF THE CASE

On December 23, 1983, Judge Hastings brought an action in the United States District Court for the District of Columbia against the Judicial Conference of the United States, the Chief Justice of the United States in his official capacity as presiding officer of the Conference; the Standing Committee of the Judicial Conference;[1] the Judicial Council of the Eleventh Circuit; the Chief Judge of the Eleventh Circuit, John C. Godbold; the members of the Investigating Committee, Judges Godbold, Tjoflat, Johnson, Pointer and O'Kelley;[2] and, in Count Four, the Attorney General of the United States, William French Smith.

The action sought a declaration that the Act is void and an injunction against continuation of the proceedings taken against Judge Hastings pursuant to the Act. Judge Hastings' complaint contained four counts. The first count challenged the facial constitutionality of the Act on separation of powers and due process grounds. The second count attacked the constitutionality of the Act as applied to Judge Hastings. The third count alleged that the complaint filed against Judge Hastings and the proceedings thereafter initiated, were the product of a conspiracy to violate his constitutional rights. The fourth count alleged a violation of appellant's rights under the Privacy Act, 5 U.S.C. § 552a (1982).

The issues came before the District Court on cross motions for partial summary judgment along with the defendants' motion for judgment on the pleadings as to certain counts on

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1 The Conference has named a Standing Committee as authorized by the Act to exercise the power of the Conference over judicial conduct matters. See 28 U.S.C. §§ 331, 372(c)(10), (12), (14), (15). This committee is known as the Committee to Review Circuit Council Conduct and Disability Orders.

2 Judges in the Eleventh Circuit named as defendants and that Circuit's Judicial Council waived objections to venue.

grounds of ripeness and subject matter jurisdiction. On July 25, 1984, the District Court issued its Memorandum Opinion. (App. 85). The District Court denied defendants' motion seeking dismissal on ripeness grounds and proceeded to address the merits of the issues raised by the cross-motion for summary judgment. It rejected Judge Hastings' facial attack under Count One of the Complaint on the constitutionality of the Act. In so upholding the facial validity of the Act, the District Court held that the Act did not pose a threat to the independence of the judiciary, that the judiciary's discharge of its tasks under the Act did not violate the separation of powers doctrine and that the Act complied with due process. As to Count Two of the Complaint, the District Court held that it had no jurisdiction over Judge Hastings' Count Two claims concerning the present and possible future application of the Act to him. The Court pointed out that the Act provides that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise", 28 U.S.C. § 372(c)(10). It ruled that the language of the Act and its legislative history plainly showed that Congress intended to establish an absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the Act. Accordingly, the District Court dismissed Count Two. It also dismissed Counts Three and Four of the Complaint.

On August 23, 1984, Judge Hastings timely noticed an appeal from the District Court's order of dismissal.

On August 13, 1985, the Court of Appeals issued its opinion holding that at the time the District Court rendered its decision, adjudication of Counts One and Two was premature. It therefore vacated the District Court's grant of summary judgment to respondents on Count One and affirmed the District Court's dismissal of Count Two. The Court also affirmed the District Court's dismissal of Counts Three and Four, although, as with Count Two, for different reasons.

Judge Hastings applied for a rehearing and for a hearing *en banc*. His application was denied.

(a) Statement of Facts

On December 29, 1981, Judge Hastings and William A. Borders, Jr. were charged, in an indictment returned by a grand jury in the Southern District of Florida, with conspiring to solicit and accept a bribe in exchange for influencing the outcome of a case pending before Judge Hastings. Borders' trial was severed and transferred to the Northern District of Georgia. On May 7, 1982, Borders was convicted after trial by jury. On February 6, 1983, Judge Hastings was acquitted by a jury in the Southern District of Florida.

On March 17, 1983, Wm. Terrell Hodges, Chief Judge of the Middle District of Florida and Anthony A. Alaimo, Chief Judge of the Southern District of Georgia, filed a verified written complaint with the Clerk of the United States Court of Appeals for the Eleventh Circuit, pursuant to the Act and the Rule for the conduct of Complaint Proceedings under 28 U.S.C. § 372(c), as promulgated by the Judicial Council of the Eleventh Circuit. The complaint alleged that Judge Hastings had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct for United States Judges.

The complaining judges alleged that:

(1) Judge Hastings had conspired with Borders to obtain a bribe in return for an official judicial act;

(2) Judge Hastings made "public and unfounded statements" that the United States was prosecuting him on racial/political grounds;

(3) Judge Hastings knowingly and publicly exploited his judicial position or acquiesced in such exploitation by others acting on his behalf by accepting financial donations from lawyers and other members of the public to defray the costs of his criminal defense;

(4) Judge Hastings, by his own testimony, had allowed *ex parte* contacts between his law clerks and counsel in

pending cases concerning substantive issues in those cases and concerning the content of orders and opinions not yet entered, and had "completely abdicated and delegated" his judicial decision-making authority to his law clerks;

(5) Judge Hastings, by his own testimony, had told counsel in a judicial proceeding that he had read an important precedent when he knew he had not and explained his deception by implying that it was common for judges to make such deliberate misstatements;

(6) Judge Hastings, by his own testimony, had exploited his judicial position by soliciting funds for someone he knew was a convicted federal offender.

The Complainants requested that the Chief Judge of the Eleventh Circuit together with any committee he may appoint pursuant to 28 U.S.C. § 372(c), the Judicial Council of the Eleventh Circuit, and the Judicial Conference of the United States make such investigations, conduct such hearings or other proceedings, and make such orders as shall be necessary to vindicate the honor of United States Judges and to discipline Judge Hastings for his odious behavior. The Complainants asked that the disciplinary measures include, but not be limited to, the making of a recommendation to the House of Representatives that Judge Hastings be impeached according to the Constitution and laws of the United States.

On March 29, 1983, John C. Godbold, Chief Judge of the United States Court of Appeals for the Eleventh Circuit, entered an order appointing an investigating committee to investigate the facts and allegations contained in the complaint. The members of the Investigating Committee are Judge Godbold; Gerald B. Tjoflat, Circuit Judge; Frank M. Johnson, Jr., Circuit Judge; Sam C. Pointer, Jr., Chief Judge of the Northern District of Alabama; and William C. O'Kelley, District Judge of the Northern District of Georgia. The Investigating Committee is statutorily empowered and required to "conduct an investigation as extensive as it considers necessary, and [to] expeditiously file a comprehensive written report

therein with the judicial council of the circuit." It is required to present both the findings of the investigation and the Investigating Committee's recommendations for necessary and appropriate action. 28 U.S.C. § 372(c) (5).

(b) The Investigation Conducted by the Investigating Committee

On June 3, 1983, the Investigating Committee began its investigation with the filing of a petition in the Southern District of Florida for access to the materials of the grand jury that had indicted Judge Hastings and William Borders as co-conspirators. The Investigating Committee had determined that it needed the materials in order to perform its statutory duty to make a complete and thorough investigation. The petition did not seek public disclosure of the materials.

On June 16, 1983, Judge Hastings appeared and filed in the public file of the District Court an answer and certain affirmative defenses. He attached as part of an appendix a copy of the complaint against him which had led to the appointment of the Investigating Committee and which theretofore had been confidential. Only the fact that a complaint had been filed, and an investigating committee appointed, had been theretofore disclosed by Judge Godbold.

All of the District Judges for the Southern District of Florida recused themselves from presiding over the matter. On December 19, 1983, United States District Judge Eugene A. Gordon, a specially designated United States District Judge from the Fourth Circuit entered an order granting the petition.

In its opinion, the District Court held that an investigating committee had the power to petition for access to grand jury materials. *In re Petition to Inspect and Copy Grand Jury Materials*, 576 F.Supp. 1275 (S.D. Fla. 1983).

On December 29, 1983, Judge Hastings filed a Notice of Appeal. On February 3, 1984, a special panel of the Court of Appeals stayed the District Court's order and expedited the appeal.

On June 30, 1984, the order granting the petition was affirmed. *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984). The Court of Appeals supported the District Court's analysis in the special circumstances of a judicial investigation under section 372(c) of the Act.

On August 24, 1984, Judge Hastings petitioned the Supreme Court for a writ of certiorari. On October 9, 1984, the Supreme Court entered an order denying the petition for a writ of certiorari.

On October 16, 1984, Judge Hastings petitioned the Supreme Court for a rehearing. On November 5, 1984, the Supreme Court entered an order denying the petition for rehearing.

On December 23, 1983, Judge Hastings brought this action in the United States District Court for the District of Columbia. The District Court, per the Hon. Gerhard A. Gesell, held that it did have the power to review the constitutionality of the Act itself. But first, the District Court rejected the defendant's claims that the only issue ripe for review was whether it is constitutional for judges to investigate judges for conduct alleged to prejudice the effective and efficient administration of the courts.

Judge Gesell found that the 1980 Act represented a legitimate exercise of Congress' "necessary and proper" power by which Congress gave the courts reasonable means to put the judiciary's own house in order.

Judge Gesell also held that the Act's provision for recommending impeachment to the House of Representatives did nothing to impinge on the exclusive power of Congress over impeachment.

Finally, Judge Gesell held that although impeachment might be the sole means of removing an Article III judge from office, it did not follow that other forms of discipline that did not remove a judge from office were foreclosed.

Judge Gesell also rejected Judge Hastings' vagueness claims. Judge Gesell rejected Judge Hastings' due process claims as well, holding that the Act expressly provides a judge under inquiry with, among other rights, the opportunity to appear before the investigating committee, present evidence and compel its production if necessary, as well as to cross-examine witnesses. 28 U.S.C. § 372(c) (10).

As for Judge Hastings' contention that the Act impermissibly combines investigative and adjudicatory power, so as to render impossible a fair adjudication, the District Court held that the mere combination of such powers, by itself, does not violate due process, citing *Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

As for Judge Hastings' particular concerns with the composition of the Investigating Committee and its actions to date, the District Court held that those were not reviewable and required Judge Hastings to follow the statutory review process. *See* 28 U.S.C. § 372(c) (10). Finally, the District Court held that it had no power to review the motives underlying Judge Godbold's order instituting the investigation. It held that 28 U.S.C. § 372 (c) (10) did not permit review of that order by Judge Hastings' collateral lawsuit.

Judge Hastings appealed. On August 13, 1985, the Court of Appeals held that at the time the District Court rendered its decision, adjudication of the constitutional issues was premature. The Court of Appeals pointed out that Count One of Appellant's complaint touched matters of profound importance for the federal judicial system, and the Court of Appeals recognized that as to each of the investigatory and disciplinary powers conferred by the Act, there may be a question of whether Congress may lawfully vest such power in an administrative organ of the federal judiciary composed of Article III judges. However, the Court of Appeals held that such a question may be answered only in an appropriate adjudicatory setting. On the basis of the record before it, the court pointed out that all that had happened was that an investigation under

the Act had begun. The court held, emphasizing the principle of constitutional avoidance, that under the circumstances the constitutional issues were not ripe for decision.

Since the decision of the Court of the Appeals for the District of Columbia, the issue of the constitutionality of the Act came before the Court of Appeals for the Eleventh Circuit. *In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488. The facts relating to this case are discussed next.

The Investigating Committee conducted, pursuant to the Act, proceedings in Atlanta, Georgia convening on May 20, 1985. A number of witnesses were subpoenaed to appear before the Investigating Committee. Certain witnesses declined to appear or, in some cases, appeared but declined to answer certain questions about what occurred in Judge Hastings chambers. Thus, Betty Ann Williams, Judge Hastings secretary was subpoenaed to appear and bring with her certain specified records maintained in Judge Hastings' chambers. She declined to appear. Several of Judge Hastings' present or former law clerks were subpoenaed to appear and give testimony. One clerk declined to appear. Two other clerks chose not to answer any questions about what occurred in Judge Hastings' chambers while they were employed as law clerks.

With respect to the witnesses who refused to appear or who appeared and refused to answer certain questions, the Investigating Committee filed appropriate motions with the Court of Appeals to compel their testimony. In turn Judge Hastings and the witnesses opposed the application and two of the witnesses and Judge Hastings also sought to enjoin the proceedings in the District Court.

On May 20, 1985, Betty Ann Williams and Alan Ehrlich, as members of the official staff of Judge Hastings, and Judge Hastings filed a complaint for injunctive and other relief in the United States District Court for the Southern District of Florida. The complaint named as defendants Spencer Mercer, the Clerk of the Eleventh Circuit, and the five judges who are

members of the Investigating Committee. By this civil action, the plaintiffs sought to challenge the validity and enforceability of the subpoenas issued under the seal of the Court of Appeals for the Eleventh Circuit at the request of the Investigating Committee. The plaintiffs moved for preliminary relief against the subpoenas, and the defendant members of the Investigating Committee filed a motion to dismiss the complaint for want of subject matter jurisdiction. On May 24, 1985, a hearing was held on the pending motions before United States District Judge William W. Wilkins, Jr. of the District of South Carolina, sitting by special designation. Following the hearing, Judge Wilkins filed a Memorandum Opinion dated May 24, 1985, in which he concluded that the District Court lacked jurisdiction over subpoenas issued by the Court of Appeals and ordered dismissal of the action. In the alternative, Judge Wilkins also considered the substance of the plaintiffs' claims and found the claims to be "without merit" because the subpoenas "are . . . valid and enforceable." *Williams v. Mercer*, 610 F. Supp. 169 (D.C. Fla. 1985) at p. 170-171. Accordingly, Judge Wilkins ordered dismissal of plaintiffs' complaint. Plaintiffs' notice of appeal followed immediately after entry of Judge Wilkins' Memorandum Opinion.

The enforcement applications then pending and Judge Hastings' appeal came on for hearing and oral argument on June 17, 1985, before the same panel of Court of Appeals judges who heard the grand jury records appeal. On September 5, 1985, the Court of Appeals for the Eleventh Circuit directed the parties to file and serve supplemental briefs on certain specific issues by 5:00 P.M. September 23, 1985. The issues were the following:

> (1) In light of the recent opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings v. Judicial Conference*, No. 84-5576 (August 13, 1985), the nature and scope of the constitutional issues the court would need to determine before it could enforce the Investigating Committee's subpoenas to the witnesses in the instant case;

(2) In light of the opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings*, *supra*, at p. 18, whether it has now become more appropriate for the court to reach the constitutional issues, and if so, what constitutional issues the court should address at this time;

(3) Whether the court should decline to address the constitutional issues for reasons stated in the opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings*, *supra*, (e.g., remoteness), or for any other constitutional issues the court should not address at this time.

On February 20, 1986, the Court of Appeals for the Eleventh Circuit held that: (1) it had exclusive original jurisdiction to determine motions to enforce or quash the subpoenas; (2) the Investigating Committee's issuance and service of the subpoenas did not violate the Constitution; and (3) the subpoenas were enforceable despite invocation of a privilege protecting communications between Judge and his staff.

In its opinion the Court of Appeals pointed out that courts of appeals cannot be deemed powerless to protect the integrity of their process, and that the Act's goals of maintaining public confidence in the judiciary and promoting the effective administration of justice require that investigations into alleged judicial misconduct be concluded as expeditiously as is reasonably possible, lest a sitting Article III judge be compelled to function under a cloud of doubt and suspicion for any longer than is absolutely necessary.

As to the existense, and investigative authority of the Investigating Committee, the Court of Appeals held that the Act did not impermissibly assign executive power, including the subpoena power, to judicial officers because investigating committees are concerned solely with matters affecting the management and reputation of the judiciary itself.

The Court of Appeals also held that the investigatory scheme established by the Act did not unconstitutionally in-

trude upon the independence of a sitting Article III judge. The Court of Appeals based its conclusion on a finding that the complaint procedure is reasonable and not overly threatening to judicial independence.

The Court of Appeals also held that the authority given to the judicial branch to certify that grounds for impeachment may exist is not inconsistent with the sole power of the House of Representatives to initiate impeachment proceedings. The Court of Appeals reasoned that the Constitution's impeachment provisions do not require that the House itself perform all preliminary investigatory functions that ultimately may inform its decision whether or not to impeach.

As to the claims of a privilege protecting communications among Judge Hastings and members of his staff, the Court of Appeals reasoned that the members of Judge Hastings' staff had only a qualified privilege because "[l]ike any testimonial privilege, the judicial privilege must be harmonized with the principle that ' "the public . . . has a right to every man's evidence." ' *United States v. Bryan*, 339 U.S. 323, 331 (1950)." The Court of Appeals held that the Investigating Committee was required to and did meet the burden of showing "the importance of the inquiry for which the privileged information is sought; the relevance of that information to its inquiry; and the difficulty of obtaining the desired information through alternative means."

The Court of Appeals then weighed the Investigating Committee's demonstrated need for the information against the degree of intrusion upon the confidentiality of privileged communications necessary to satisfy that need and concluded that the judicial privilege was overridden by the Investigating Committee's need for the testimony of the law clerks to further its investigation.

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Appeals that the case was not ripe for adjudication is consistent with the prior decisions of this Court and not in conflict with the decision of any other Federal Court of Appeals.

It is well established that constitutional issues affecting legislation will not be determined in advance of the necessity of deciding them and that in the absence of a case where the underlying constitutional issues are in clean cut and concrete form, the court will not consider them.

In this case, at the time of the District Court's decision, the concrete facts were that (a) a complaint had been filed under the Act, (b) a special committee had been designated to investigate the complaint as extensive as it considered necessary, and (c) a fact gathering investigation had begun. It was at that stage of the proceedings that Judge Hastings asked the District Court to pass on the constitutionality of the entire Act of Congress that vested in the Judicial Councils a number of powers, none of which had yet to be invoked against him.

With respect to the fact gathering aspect of the investigation, the Court of Appeals declined to render judgment on the investigation itself while in progress. The Court of Appeals likened this investigation to ongoing administrative proceedings where courts are loath to interfere except in unusual circumstances.

The Court declined to find such unusual circumstances, i.e. irreparable injury, because no sanction had been imposed (Judge Hastings had not been subpoenaed to testify) and because Judge Hastings had available his constitutional challenge to the validity of the Act in every one of the situations in which he might be exposed to the threat of injury. The Court of Appeals pointed out that Judge Hastings could impose his constitutional arguments as a defense to a subpoena, or a ground for review by a Judicial Council or the Judicial Con-

ference determination, and in a lawsuit brought when injury is significantly more immediate and concrete than now.

With respect to the expenditure of legal fees, this Court has held in *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232 (1980), that the expense and disruption in defending oneself, even if substantial, does not constitute irreparable injury to a respondent before the F.T.C. Furthermore, while Judge Hastings has expended legal effort in opposing the Investigating Committee's investigation, he has chosen to boycott the proceedings since the Investigating Committee began its investigation.

Petitioner also complains of a so-called intercircuit shell game but it was petitioner himself that forum shopped in the District of Columbia. The fact that the petitioner's suit is in the District of Columbia suggests another reason for not reviewing the decision below. It makes for sound judicial administration to allow the Court of Appeals in the Eleventh Circuit to take the lead in considering the constitutional issues, if any, raised by the Act with respect to a proceeding pending in the Eleventh Circuit.

2. The Decision of the Court of Appeals for the Eleventh Circuit is a further reason why this Court should not grant the Petitioner's application for a Writ of Certiorari.

The Court of Appeals for the Eleventh Circuit, in a carefully reasoned and detailed opinion, has considered a number of petitioner's constitutional claims and has rejected them. On March 28, 1986, the petitioner sought a writ of certiorari in that case, and, while the respondents will urge that there is no basis for granting a writ in that case, if a writ is granted, that is the case when it should be done. In that case the Court of Appeals had the benefit of a full analysis of concrete issues which arose in a contested situation.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: May 2, 1986
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